

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

2:59 pm, Sep 01, 2020  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
LONG ISLAND OFFICE

TONY CACCAVALE et al,

*Plaintiffs,*

v.

HEWLETT-PACKARD COMPANY et al,

*Defendants.*

Docket 20-cv-00974-GRB-AKT

United States Courthouse  
Central Islip, New York

July 15, 2020

11:10 a.m. - 11:40 a.m.

TRANSCRIPT FOR CIVIL CAUSE  
TELEPHONE PRE-MOTION CONFERENCE  
BEFORE THE HONORABLE GARY R. BROWN  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

*For Plaintiffs:*

STEVEN JOHN MOSER, ESQ.  
PAUL ANDREW PAGANO, ESQ.  
Moser Law Firm PC  
5 East Main Street  
Huntington, New York 11743  
(516) 671-1150; (516) 882.5420 fax

*For HP Inc. and Hewlett  
Packard Enterprise Company:*

KRISTOFOR T. HENNING, ESQ.  
ILANA SARAH LEVIN, ESQ. (NJ Ofc)  
McCarter & English LLP  
1600 Market Street, Suite 3900  
Philadelphia, Pennsylvania 19103  
(215) 979-3800; (215) 979-3899 fax

*For Unisys Corporation:*

KENNETH WELCH DIGIA, ESQ.  
JEFFREY HOWARD RUZAL, ESQ.  
Epstein Becker & Green, P.C.  
875 Third Avenue  
New York, New York 10022  
(212) 351-4500; (212) 878-8600 fax

*Transcriber:*

AA EXPRESS TRANSCRIPTS  
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(888) 456-9716  
aaexpress@court-transcripts.net

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1 COURTROOM DEPUTY: Calling case civil 2020-00974,  
2 Caccavale et al v. Hewlett-Packard Company et al. Counsel,  
3 please state your appearance for the record. Plaintiff goes  
4 first.

5 MR. MOSER: Steven Moser, for the Plaintiff. Good  
6 morning, Your Honor.

7 THE COURT: Good morning, Mr. Moser.

8 MR. PAGANO: Also, Paul Pagano, for the Plaintiff.  
9 Good morning, Your Honor.

10 THE COURT: All right. And for Defendants?

11 MR. HENNING: Your Honor, Kris Henning, from McCarter  
12 & English, for Defendant, HP Inc. and Hewlett Packard Enterprise  
13 Company.

14 MS. LEVIN: Good morning, Your Honor, Ilana Levin,  
15 also for HP Inc. and Hewlett Packard Enterprise Company.

16 THE COURT: Is that it?

17 MR. RUZAL: Good morning, Your Honor. Jeff Ruzal from  
18 Epstein Becker & Green, for Defendant, Unisys Corporation.

19 THE COURT: Okay.

20 MR. DIGIA: Kenneth Digia, from Epstein Becker &  
21 Green. Also, for Unisys Corporation.

22 THE COURT: Anyone else?

23 (No response.)

24 THE COURT: I think that's a sufficient pause to say  
25 no. So, I'll say no on that. Thank you, everybody. And I'm

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1 going to ask, to the extent possible, counsel just designate one  
2 speaker, because this is hard. And let me start out by saying,  
3 we're here for a pre-motion conference by Defendants We are  
4 working under very difficult conditions. It should be noted  
5 that the pandemic is still raging across this country, sadly,  
6 and we are working under difficult conditions. This is an audio  
7 conference, but I'm sure everyone will do a fine job.

8 I will remind counsel, before we start, that I do  
9 reserve the right, it's in my rules, it's also a second circuit  
10 approved procedure to deem the pre-motion filing as the filings  
11 themselves. I'm not sure I'm going to do that today, but I do  
12 reserve the right to do that to combine that with the arguments  
13 made today. So, feel free to argue anything you want to me  
14 today. I will not preclude any arguments that you might want to  
15 make. So, with that mind, between the Defendants, who would  
16 like to go first?

17 MR. HENNING: Your Honor, this is Kris Henning from  
18 McCarter & English, for Defendants, HP Inc. and Hewlett Packard  
19 Enterprise Company. I'm happy to take the first crack at it if  
20 that's okay with everyone.

21 THE COURT: Okay. That's great. Let's do that. And  
22 let me just focus you on one issue because having done some  
23 review of the pre-motion filing, I'm interested in one of your  
24 issues, which is the question of whether state law provides a  
25 remedy for the late payment of wages. That's an interesting

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1 issue. So, if you focus your comments on that, I'd be most  
2 interested, but I'll let you speak to anything you want.  
3 please, go ahead.

4 MR. HENNING: Absolutely. Will do, Your Honor.  
5 Briefly. Your Honor, has clearly read the papers and knows that  
6 we're here on two claims as to my client, Sections 191 and 198  
7 of the Labor Code. Plaintiffs allege that they are manual  
8 workers, who were paid bi-weekly instead of weekly. And in  
9 count two, which is asserted against only Hewlett Packard  
10 Enterprise Company ("HPE"), a Section 195 claim of the Labor  
11 Code, alleging that HPE failed to provide a sufficient notice,  
12 wage notice, at the time at the of hiring.

13 In count one, the Plaintiffs don't allege, Your Honor,  
14 that they were paid an insufficient amount of wages, or that  
15 they were paid wages that were lower than they were required to  
16 receive from any Defendant. Instead, the claim is, as we said,  
17 they were paid bi-weekly instead of weekly, which takes us right  
18 to the issue Your Honor asked me to focus on, and so we'll get  
19 to it.

20 Section 198 provides a remedy for "underpayment of  
21 wages." We have cited a few cases to Your Honor for the  
22 proposition that underpayment is not the same as late payment,  
23 and therefore, Section 198 does not provide a remedy or,  
24 therefore, a claim for instances in which a Defendant is alleged  
25 to have paid the full amount of wages due to the Plaintiff, but

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1 is alleged to have done so past the deadline Plaintiffs claim  
2 against.

3 THE COURT: Counsel, let me interrupt you for one  
4 second. To say that you cited me some cases, I think you would  
5 agree with me, and please correct me if I'm wrong, that among  
6 the cases cited there's nothing that would constitute what we  
7 refer to as binding authority. Am I right about that?

8 MR. HENNING: You are right about that, Your Honor.  
9 Nothing from the Second Circuit or the New York Court of Appeals  
10 on this particular question. And as we said in our pre-motion  
11 letter to the Court, we acknowledge that the caselaw on this  
12 issue is not uniformed. We gave the Court four cases. One from  
13 the Eastern District of New York, RCLQ. Also, cited  
14 Beillevaire. And then, two state court cases, Hunter and  
15 Phillips. And, Your Honor, there's no need to go through them  
16 individually, except to say, RCLQ, obviously, from the same  
17 court in which we're talking to you, all of them stand for the  
18 proposition that Section 198 does not provide for a claim for  
19 late wages that are fully paid.

20 And the analysis, Your Honor, we think is on point.  
21 Under payment, the ordinary usage of the term "underpayment" is  
22 to be paid less than an amount required to be paid. There is a  
23 difference in the ordinary usage of the terms between being paid  
24 less than an amount required and later than the deadline by  
25 which you're supposed to be paid.

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1 The New York Legislature --

2 THE COURT: Let me stop you there, counsel. Let me  
3 stop you there. I think I understand this correctly. What I'm  
4 going to say is not unprecedented. Meaning it's happened  
5 before, but it's sort of an oddity. It would be your position  
6 that in looking at the state labor law in it's entirety, and you  
7 just said, wages when they're supposed to be paid, bi-  
8 weekly/weekly, there may be little question as to whether or not  
9 that in fact happened in that the legislature has deemed that  
10 inappropriate under law, right? That you should be paid weekly  
11 and not bi-weekly in certain categories. Then the question  
12 would be, would the legislature create such a rule without  
13 creating a remedy?

14 MR. HENNING: Good question, Your Honor. We think  
15 that speaks to the division of "authority" is probably the word  
16 I've been using. We'll see if the Court agrees that's the right  
17 one. The legislature decided to give to two different folks.  
18 One, on the one hand, employees or former employees. And on the  
19 other hand, the Labor Commissioner for the State of New York.

20 Our read of the statute, Your Honor, is that the New  
21 York Legislature made the decision to give two employees or  
22 former employees the ability to seek redress through Section 198  
23 for "underpayment of wages."

24 THE COURT: Okay.

25 MR. HENNING: The authority the New York Legislature

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1 decided to give to the Commissioner is broader and is not  
2 limited in the same way as it is limited to employees or former  
3 employees. So, to answer the Court's question more directly, we  
4 don't think that an employer -- let me take a step back.  
5 There's no allegation in this case that HPE, or Unisys, or any  
6 Defendant is delaying forever and ever wage payment and only  
7 paying them on the eve of litigation. So, that's not the set of  
8 facts we're alleged to be operating under here. But should  
9 there be employers who are behaving unscrupulously and up to no  
10 good, and the marketplace can't handle that, our read of the  
11 statute is, it is not the case that those employers are free to  
12 create mischief around the state, but rather that is something  
13 for the Labor Commissioner and not employees that are former  
14 employees. And we think --

15 THE COURT: So, your suggestion, counsel -- let me  
16 make sure I understand. Your suggestion is that, if I'm a wage  
17 earner who's not being paid properly in this respect, in the  
18 respect alleged here, meaning bi-weekly instead of weekly, I'm  
19 not without remedy, but my remedies are limited to an  
20 administrative forum. Is that fair?

21 MR. HENNING: Or brought by remedies that could be  
22 obtained/brought by the Commissioner, and then, of course, the  
23 Commissioner has all sorts of authority to collect payments from  
24 the employer and do with them what is appropriate vis-à-vis the  
25 employees. So, that sort of division of the world, Your Honor,

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1 is how we see the statute breaking.

2 Underpayment, the statute is very clear that employees  
3 and former employees, certainly, have the right to seek redress  
4 where there is an "underpayment". And that's, admittedly, a  
5 limited universe of places. And the New York Legislature said,  
6 for other things that are not underpayment, the Labor  
7 Commissioner holds the hammer there. And, Your Honor, we think  
8 that our interpretation, our proposed interpretation of the  
9 statute remains faithful to that language. And to treat "late"  
10 the same as "underpaid" or "paid less than an amount", which we  
11 think are two different things, sort of ignores the division  
12 that the New York Legislature decided to make between what  
13 employees and former employees can do versus what should be left  
14 to the Labor Commissioner.

15 THE COURT: Given what's at issue in this case, given  
16 how it breaks down in terms of the amount of damages and so  
17 forth potentially, is it fair to say that although you have  
18 another argument about wage notice, which I will hear from you  
19 in a moment, that's sort of the tail wagging the dog. Meaning  
20 that this is the kind of issue that would govern largely what  
21 happened in this case might be the kind of issue that would be  
22 appropriate for an interlocutory appeal. Am I right about that,  
23 or no?

24 MR. HENNING: I certainly agree with the Court that  
25 this certainly appears to be the Plaintiff's primary claim,



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1 count one, and that the question of whether a claim even exists  
2 when the allegations are late paid as opposed to underpaid is  
3 certainly as critical question in the case. I can't say I  
4 thought a lot about the 1292 requirements, but there certainly  
5 does appear to be, as we've acknowledged in our letter, there  
6 does appear to be a difference in the caselaw, so there's a  
7 difference of opinion on that. And it seems to have the  
8 potential to sort of greatly narrow or resolve the issues in the  
9 case. I'm speaking of a difference of opinion.

10 THE COURT: Okay.

11 MR. HENNING: The primary cases on the other side of  
12 this, Your Honor, as Plaintiff cited in the letter, and we  
13 previewed for the Court as well, are Scott, from the Eastern  
14 District of New York, and Vega from the Appellate Division in  
15 the State Court in the First Department.

16 THE COURT: Right.

17 MR. HENNING: And we think there are generally two  
18 places those cases, those decisions, we think kind of run astray  
19 from the language here. In the ordinary usage of these terms,  
20 there is a difference between being paid less than and the  
21 amount you're supposed to be paid, and after a deadline. And we  
22 think that treating underpayment as late paid, it's just not  
23 faithful to the language that the New York Legislature decided  
24 to use.

25 The New York Legislature certainly understands what it

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1 means to be paid late, and it certainly understands what it  
2 means to be less than an employee is supposed to be paid. And  
3 they decided in Section 198 only to speak in terms of an  
4 underpayment and not late paid. In the most recent state or  
5 Supreme Court cases, including Bostock and others, I think our  
6 directions were, we should take the statutes as they come to us,  
7 and take the decisions that were made by the legislature as they  
8 exists.

9 The second piece of those cases --

10 THE COURT: So, counsel, before you go to the second  
11 issue, what I'll say about the first issue is, that's  
12 fascinating. And if your clients are on the line, I don't know  
13 if you have corporate counsel on the line or not, but what I  
14 would say about the fascinating issue is that's bad, because  
15 that's expensive, right? Fascinating costs money. But  
16 nevertheless, I'm fascinated, so thank you for that. Let's jump  
17 to your next argument, please.

18 MR. HENNING: The next one, I think we can quickly  
19 dispense with, Your Honor. The Court in Vega actually goes to  
20 the dictionary definition of underpaid. But think we think the  
21 result is not faithful to the definition it cites. As the court  
22 in Vega says, the definition of underpaid is less than. And  
23 again, in the ordinary usage of these terms, less than and late  
24 are different things.

25 THE COURT: Let me just make clear on the facts here

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1 as alleged. It was never a catch-up situation. It wasn't like,  
2 oh, you were sued and suddenly you paid them a bunch of money.  
3 It was just that you always paid them bi-weekly, and that's the  
4 lateness that we're talking about. Yes?

5 MR. HENNING: You're right. The Court has correctly  
6 captured the allegations in the complaint. Exactly right.

7 THE COURT: All right. Counsel, your only point there  
8 is, it's your belief these folks were hired too early in time to  
9 qualify or the notice provisions. Yes?

10 MR. HENNING: Well, Your Honor, that is true as  
11 against some Defendants. You're right that the wage notice  
12 claim does not apply to folks who were hired before, I believe,  
13 it's April of 2011. I suspect that's in part why count two is  
14 only asserted against one Defendant, Hewlett Packard Enterprise  
15 Company. And on that issue, Your Honor, just ten seconds of  
16 background.

17 The Plaintiffs worked for many years for an entity  
18 called Hewlett Packard Company, the old HP as many of us  
19 remember. As of November 1, 2015, this is alleged in the  
20 Plaintiff's complaint, Hewlett Packard Company split into two  
21 different entities. One of those entities was Hewlett Packard  
22 Enterprise Company. I think, Your Honor, I'm going to dumb down  
23 the corporate transaction language here and my colleagues would  
24 be upset with me if they heard me do it, but a spinoff  
25 transaction of a business unit from old HP Co. And then as the

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1 Plaintiffs alleged, they are correct, HP Inc., the rest of  
2 Hewlett Packard Company, was renamed HP Inc.

3 And what happened, Your Honor, as part of that  
4 transaction, these Plaintiffs moved over to Hewlett Package  
5 Enterprise Company. And so as against HPE, our argument is, the  
6 statute requires the wage notice "at the time of hiring." And  
7 it is our read of the statute that these folks were not hired by  
8 HPE within the meaning of the statute. Instead, an entire  
9 business unit was taken out of one company and stood up as its  
10 own independent entity.

11 The complaint, Your Honor, the original complaint,  
12 alleged that these folks, the Plaintiffs "moved from HP to HPE  
13 and we think that's an accurate description of what happened.  
14 The current complaint, the amended complaint changes that  
15 description to say they were hired by HPE to match the element  
16 of the wage-notice claim. So, in the words of Iqbal and  
17 Twombly, there are no factual differences. The complaints don't  
18 have any allegations of factual differences and how these folks  
19 ended up at HPE. And the language of hiring is, again in the  
20 Iqbal and Twombly words, a recitation of the element of the  
21 claim or a label or a conclusion. These folks don't allege that  
22 they ever lost employment or that there were breaks in services.  
23 They were part of a business unit that was spun out and stood up  
24 as its own independent entity. And on those facts alleged, we  
25 don't think that's a hiring, within the meaning wage notice.

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1 THE COURT: So, to correct my question then, I guess  
2 your position is, these folks were all hired before, and there's  
3 this sort of interesting hiccup about when there's a spinoff,  
4 again, using the colloquial, a spinoff of an entity, does that  
5 constitute a new hiring or not? Do I have that about right?

6 MR. HENNING: Yes, Your Honor. That's right.

7 THE COURT: Okay. But there's one employee, one  
8 plaintiff, who was just flat out hired after the relevant date?

9 MR. HENNING: I don't think so, Your Honor. I think  
10 there is one who has had a different experience with Unisys.  
11 After these folks moved to Hewlett Packard Enterprise, they then  
12 moved to Unisys, and I'll let the Unisys folks talk to that, but  
13 I think the distinction you may be hitting on is that one of  
14 them has had a different experience at Unisys than the other  
15 two.

16 THE COURT: Right. Interesting. Interesting. Well  
17 done, counsel. Thank you. All right. With that, let me switch  
18 to counsel for Unisys. What would you like to tell me today?

19 MR. RUZAL: Thank you, Your Honor. And this is Jeff  
20 Ruzal from Epstein Becker. I will be speaking on behalf of  
21 Unisys today. With not wanting to replicate what Mr. Hennig  
22 just spoke, I'll try to supplement to conserve judicial  
23 resources and everyone's time today.

24 To take it back, the sole claim against Unisys is the  
25 191, frequency of payee claim. So, we do not have the wage

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1 notice clam, so we won't be speaking about that today. And I  
2 agree with Your Honor's characterization that this certainly is  
3 an issue that could find itself in interlocutory appeal as it is  
4 the sole issue with respect to Unisys. I completely echo what  
5 counsel for the HPE Defendants had iterated with respect to 198  
6 not supporting a claim for liquidated damages in the absence of  
7 an underpayment, i.e. nonpayment of wages, which was exactly the  
8 case with respect to Unisys Corporation as well.

9 I'll point out in addition to the caselaw that counsel  
10 had indicated in the Eastern District. I believe there are two  
11 additional cases that support that same notion, which are Encoli  
12 and Husain. And we likewise believe that the court in Vega was  
13 not following the statutory intent insofar as claiming that or  
14 stating, I should say rather, in the decision that, "the moment  
15 that an employer fails to pay wages in compliance with 191-1.a.,  
16 the employer pays less than what is required." Liquidated  
17 damages under Section 198.1-a are defined as equal to 100  
18 percent of the total amount of wage found to be due. Therefore,  
19 if such wages had already been paid, there would be no basis for  
20 there to be liquidated damages that are owed, which is why we  
21 disagree strongly with Vega. And that the large swath of  
22 decisions in the Eastern District follows that position,  
23 contrary to Vega with the sole decision, of course, in Scott,  
24 which counsel had already discussed.

25 Interestingly, in Scott, it's our belief that this was

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1 somewhat underdeveloped, respectfully, and for that reason  
2 should be discounted. There really was no analysis, what  
3 linkage to 198 itself, or discussion in terms of how it should  
4 be interpreted with respect to being an underpayment or not, but  
5 rather, focused solely on the issue of whether or not there's a  
6 public policy issue (indiscernible). Which again, as Your Honor  
7 pointed out, if an employer wanted to try to avoid the law and  
8 not pay wages when they're owed under Section 191, and cross  
9 one's fingers that there's never actually a lawsuit filed, and  
10 they're getting the time value of not having to pay those wages  
11 that are owed, that's one thing. That's certainly not the case  
12 with respect to Unisys, that they paid on a current bi-weekly  
13 basis, which is to say, basically, all of the wages were  
14 effectively paid within the seven-day requirement if we believe  
15 that it was perhaps only limited overtime wages and perhaps  
16 certain differential wages that had been paid in the following  
17 pay period. So, there was no blatant attempt here to go outside  
18 the law itself. And so, for those reasons, we just do not  
19 believe that that statute provides for the relief that  
20 Plaintiffs seek. And that's our position, again, without being  
21 too cumulative with respect to the frequency of pay claim.

22 THE COURT: Okay. Counsel, let me ask you a question  
23 because you raised an issue with me about waiver. That  
24 Caccavale and Mangelli waived all claims. My question on that  
25 is this. In a legal system that requires what we call "Cheeks

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1 approval", where you come to court and we have all these issues  
2 that we look at. And even when you have counsel and you're  
3 represented and there's an arm's length negotiation, the Court  
4 still has to review the settlement for fairness, and non-  
5 confidentiality, and all these different things. My question  
6 is, in that world, can we really rely on an employee exit waiver  
7 to stop this case? I'm not sure.

8 MR. RUZAL: I think we can, Your Honor, on two points.  
9 The first point is that, where there's a bona fide dispute over  
10 actual wages that are owed, then, yes, that would be something  
11 brought or materialized in a claim that, whether settled or  
12 litigated, would have to be approved by a district court or an  
13 employee for the U.S. Department of the Labor. Here, there is  
14 no underpayment of wages. There are no wages that are owed, and  
15 there's no bona fide dispute over whether wages are owed.

16 And secondly, and we point this out in our pre-motion  
17 letter to Your Honor, the fact that there are these waivers and  
18 the fact that there are arbitration agreements provides  
19 specifically that, again, there really should not be any sort of  
20 class claims that could be brought. And I'll mention, as I'm  
21 sure Your Honor noticed, that Mr. Pagano's letter concludes by  
22 stating that Plaintiffs, Caccavale and Mangelli, are willing to  
23 withdraw their claims against Unisys without prejudice because  
24 of the fact that they have signed releases.

25 THE COURT: Oh, okay. I missed that detail. That



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1 makes it easier. Interesting. Okay. Good. Anything you want  
2 to add, counsel?

3 MR. RUZAL: No. No. I really wanted to also mention  
4 the class certification piece in connection with Your Honor's  
5 question. The only other thing I'll say is that because there  
6 are signed releases for a good number of individuals, we really  
7 thing that any class would be severely terminally compromised  
8 here. And this is a fact that we had pointed out to counsel for  
9 the Plaintiffs before this had been filed. This is something  
10 that had been at light for quite some time here. Again,  
11 understanding this a potential motion to dismiss, not in our  
12 petition for class certification, but nonetheless, to try to  
13 address this as early as possible for the sake of efficiency.  
14 We just don't think a class is appropriate here. Specially,  
15 where two of the three named plaintiffs have signed releases.  
16 Not to mention any of the other potential putative class  
17 members.

18 THE COURT: Right. Okay. Good. Thank you. All  
19 right, Mr. Moser, over to you. Now, counsel has said a lot.  
20 And there's a lot to respond to. But Mr. Moser, I know you  
21 quite well, and I know you've never shied away from a challenge,  
22 so I'll hand it over to you, sir, with that in mind. Go ahead.

23 MR. MOSER: Yes. And before I begin, this is the  
24 first time I'm appearing in front of you since December of last  
25 year, and I'd like to extend my hardest congratulations.

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1 THE COURT: Thank you. And in case other counsel  
2 don't know, I became an Article III Judge. I was a magistrate  
3 judge for many years, and I finally got confirmed in December of  
4 last year. So, thank you, Mr. Moser. And what counsel, if they  
5 haven't met you yet, should know is that you usually have an  
6 impressive bowtie on when you go to court, and they should look  
7 forward to that in the future when we're allowed to appear in  
8 person again.

9 MR. MOSER: Thank you. Thank you.

10 THE COURT: So, Mr. Moser, what do you want to say?  
11 And let's focus on the 191, 195, 198 argument, please.

12 MR. MOSER: Here, what the Defendants really want to  
13 say is, look, we paid these people every two weeks. We didn't  
14 delay wages for a month or more. These men were even expecting  
15 to be paid on a bi-weekly basis, not on a weekly basis. And  
16 it's not like the schedule said that they were going to be paid  
17 on the 15<sup>th</sup>, and they were only paid on the 21<sup>st</sup>. So, I guess  
18 the question from their perspective is, what is the justice in  
19 allowing these employees to sue us for liquidated damages? And  
20 the answer is very simple, it may not seem fair, but this is a  
21 court of law, and the law make what they did illegal.

22 And when we look at Vega, Vega is not a case out of  
23 the Court of Appeals, but it is a case from an intermediate  
24 state appellate court, and therefore, I'm quoting from a  
25 decision of Judge Forestine, who actually addressed this issue.

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1 And she quotes "Cowan v. The City of Mt. Vernon, which is out of  
2 the Southern District, that in making the determination of how  
3 the Court of Appeals would rule, the rulings of intermediate  
4 state courts are entitled to persuasive, if not decisive  
5 consideration." And even the Second Circuit has said, in Fieger  
6 v. Pitney Bowes, 251 F.3d 386, "The holding of an intermediate  
7 appellate state court... is a datum for ascertaining state law  
8 which is not to be disregarded by a federal court unless it is  
9 convinced by other persuasive data that the highest court of the  
10 state would decide otherwise."

11 And so, Vega, although, they disagree Vega, Vega is  
12 the highest appellate decision specifically on point, and  
13 therefore, it should be followed. There's one other decision.  
14 It's actually out of the court of appeals, which also is  
15 interesting, and it indicates that the court of appeals would in  
16 fact rule that there is a private right of action under 191.  
17 And that case is Bynog v Cipriani Group, 1 N.Y.3d 193 (2003).  
18 And in that particular case, the appellate division had found  
19 that the plaintiffs were actually suing under New York 191 for  
20 untimely payment of wages. The appellate division found that  
21 the plaintiffs were employees and reinstated a cause of action  
22 under New York Labor Law § 191, which had been dismissed by the  
23 trial court.

24 It went up to the Court of Appeals, and the Court of  
25 Appeals concluded that the plaintiffs were independent

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1 contractors, and on that basis alone, dismissed the cause of  
2 action under New York Labor Law § 191. But significantly,  
3 neither the Second Department, nor the Court of Appeals  
4 suggested that the plaintiffs did not have a right to bring a  
5 claim under New York Labor Law § 191 in the first instance. So,  
6 it seems as if the Court of Appeals tacitly acknowledged in that  
7 decision that yes, indeed, a private right of action exists  
8 under New York Labor Law § 191, which is redressable under New  
9 York Labor Law § 198. So, again, those two decisions are  
10 significant.

11 And with regard to the role of the federal courts in  
12 applying New York State Law, this Court is better versed at it  
13 than I am, but I understand that the goal is to ascertain how  
14 the Court of Appeal would rule on the issue. And when we look  
15 at all of the cases that are on the record regarding 191, there  
16 is only one judge who actually asked that question, and that is  
17 Judge Feuerstein I Scott v. Whole Foods Mkt. Grp., Inc. So,  
18 when we look at persuasive authority, I think that that case is  
19 the case that should be looked at because she's the only one  
20 who's asked the relevant question. And it all started with  
21 Husain v. Pakistan Airlines, in which there's no analysis in  
22 that case anywhere, and that particular district judge ruled, I  
23 think it was Gorman, but I'm not sure; that there's no right of  
24 action under 191 and 198. But he did that in one sentence  
25 without any analysis whatsoever, and it seems that that kind of

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1 caught on.

2 I understand it's inconvenient for the Defendants what  
3 I'm saying, but again, the state of the law is, at this point in  
4 time, that a private right of action exists for late payment of  
5 wages, and the state of the law is that the remedy is liquidated  
6 damages.

7 I don't want to belabor the other issues with regard  
8 to the releases. Mr. Pagano already indicated we're not  
9 interested in making more work for the Court if there's relief  
10 on point. I think that the distinguishing factor between this  
11 case and Cheeks is that Cheeks involved FLSA review, and there's  
12 no FLSA claims here.

13 THE COURT: Good point.

14 MR. MOSER: I don't know if I'm missing anything here.  
15 Oh, with regard to the --

16 MR. PAGANO: The hiring notice.

17 MR. MOSER: Oh, the hiring notice. Thank you, Paul.  
18 There is a question of fact, at the very least, as to whether  
19 these individuals were hired by this other entity.

20 THE COURT: Right.

21 MR. MOSER: You know, they're receiving their  
22 paychecks from a different company. How is that not a hiring?

23 THE COURT: Interesting. Also, an interesting  
24 question, although, very much a subsidiary one, in the sense  
25 that the first thing you addressed is obviously, the guerrilla

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1 in the room. And that's the big thing. So, we have to look at  
2 that first, I think.

3 MR. MOSER: Correct.

4 THE COURT: So, let me just double-check. You were  
5 saying that the two Plaintiffs with the releases are willing to  
6 withdraw their claims against Unisys. So, that issue is out of  
7 the case, yes?

8 MR. MOSER: Correct.

9 THE COURT: Okay. So, we'll deem that ordered. Based  
10 on this transcript, we're done. Understand, we're working under  
11 very difficult circumstances, and I'm trying to move cases as  
12 efficiently as possible dictated by Rule 1, with the recognition  
13 that, of course, we're all facing a deadly pandemic and doing  
14 our best. So, let's at least move that piece today. So, we've  
15 got that.

16 I started this conference by reminding everyone of my  
17 authority and my rule to deem it as the motion itself, and I  
18 have not been shy about doing that in recent month because it's  
19 very hard times for everybody. But I have to say, the 191, 195,  
20 198 issue, the issue about whether or not there's a remedy for  
21 the late wages is fascinating to me and difficult and there's  
22 not a clear answer. I mean so many times, I get motions from  
23 lawyers and you just say, well, the Second Circuit said this, so  
24 we're done. We don't have that here.

25 I commend counsel, obviously, for their work.

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1 Everyone acknowledged that my colleague, Judge Feuerstein, delve  
2 into this issue, and she came out one way. And I'm not saying  
3 I'm not persuaded by her work, but I haven't really thought  
4 about this very long. What I propose to do, and I'd love to  
5 hear if counsel has any objection to this, I would love for you  
6 all to brief that one issue. In other words, I don't want to  
7 put through extra expense, and we don't have to drag out  
8 everything. I think Plaintiff's counsel is right, at least,  
9 whether there's a hiring or not, probably should await summary  
10 judgment. The wage notice thing is interesting, but again, it  
11 turns on some facts that we might not have before us right now.  
12 But what I would love to do is just ask you all to write a  
13 brief. And when I mean a brief, I use the word in every sense.

14 I don't need 500 pages. It doesn't have to be  
15 aspirational. I don't set page limits, like everybody writes me  
16 35 pages. I don't need that. But I would love you to be able  
17 to fully brief the issue. I could decide the issue; hold  
18 everything else, other than what we've talked about today, in  
19 abeyance, so we can get that decided. And if this is the kind  
20 of case you want to go with an interlocutory appeal and the 1292  
21 factors are there, we can have that discussion once we've had a  
22 chance to look at it. Rather than proceed on class action  
23 discovery and so forth. Maybe this is a good way to do this.  
24 But I would welcome the views of counsel on that procedure  
25 before I put my stamp on it. What do you think?

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1 MR. HENNING: Your Honor, this is Kris Henning --

2 MR. MOSER: For the Plaintiffs --

3 MR. HENNING: I'm sorry, go ahead.

4 MR. MOSER: For the Plaintiffs, I'm fine with that,  
5 from my perspective, in terms of just a brief. And also, in  
6 every sense of the word.

7 MR. HENNING: And, Your Honor, this is Kris Henning,  
8 for HP Inc and HPE, we don't have an objection to that path  
9 forward with one clarifying question. It sounded like the Court  
10 envisioned simultaneous papers coming in from everyone at the  
11 same time, rather than, put one in, and then respond to the  
12 other side kind of path?

13 THE COURT: Maybe it's easier to alternate, but I'll  
14 leave that up to you. It could be had either way on that  
15 question.

16 MR. RUZAL: And, Your Honor, for Unisys Corporation,  
17 likewise, we have no objection. We think that that makes good  
18 sense.

19 THE COURT: Okay. So, let's do this. Let's do a  
20 traditional sort of brief, response and reply, just so you can  
21 think in normal ways about this, and not anticipate things that  
22 don't happen. Understand, I do a pre-motion conference with the  
23 hope of doing exactly what we did today, which is to focus your  
24 efforts on things that matter in the big sense. Everyone is  
25 free to make any motion they want. I'm not denying anyone. I'm



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1 not not hearing any arguments. I actually heard you. And I  
2 should say that all counsels have done a fine job today. And  
3 one of the reasons why I'm interested to take on an issue like  
4 this in a case like this is because I have good counsel on both  
5 sides and I'm eager to take a look at your work and work on this  
6 with you. Particularly, if this will be interesting. So, let  
7 me ask Defendants first. When would you like to get your briefs  
8 in? And gain, please, keep them short. And if you need more  
9 time to write a shorter brief, I'm happy with that. Tell me how  
10 much time you need.

11 MR. HENNING: Your Honor, does something like three  
12 weeks sound acceptable?

13 THE COURT: If it's good for both of you, it's  
14 wonderful for me. Is everybody on board with that?

15 MR. RUZAL: Unisys can make that work as well, Your.  
16 Honor, yes.

17 THE COURT: Excellent. Mr. Moser, they're going to  
18 take three weeks; they're going to send you briefs, and  
19 hopefully short briefs, to the point, punctually, timely, and  
20 nicely written. How long would you like to respond to that, Mr.  
21 Moser?

22 MR. MOSER: I'd like three weeks to respond.

23 THE COURT: That sounds perfectly, just and equitable.  
24 That's amazing. Perfect. Three weeks and three weeks. And  
25 then a week for a reply from Defendants? Then again, a reply,

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1 you don't even have to submit one if you don't think you need  
2 it. Fair enough.

3 MR. HENNING: Sounds fine, Your Honor.

4 MR. RUZAL: Sure. Yes, Your Honor.

5 THE COURT: All right. So, we have a schedule. We  
6 have a plan. We're going to focus on the big issue I the case.  
7 And then, is there anything else I need to do while have you  
8 all? And by the way, the record should reflect officially we've  
9 withdrawn those claims that were released. So, you don't have  
10 to worry about those, which is good. We've made some progress  
11 today. Anything else I need to do while I have you all  
12 together?

13 MR. MOSER: Not from the Plaintiff's perspective, Your  
14 Honor. Thank you.

15 THE COURT: All right.

16 MR. HENNING: And none from us as well, Your Honor.

17 MR. RUZAL: And none from Unisys either, Your Honor.

18 THE COURT: Excellent. All right. In that event,  
19 I'll let you all go and get to work. Please wash your hands.  
20 and wear a mask, and stay well because these are tough times.  
21 But I look forward to getting your briefs, counsel. All right?

22 ALL COUNSEL: Thank you, Your Honor.

23 THE COURT: Okay. We are adjourned. Be well.

24 - o0o -  
25

CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: August 31, 2020

  
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Rochelle V. Grant

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